



EWNZ

**RESPONSE TO THE APPLICATION FOR
SCHEDULE 3A UNDERTAKING IN RESPECT OF
NATIONAL ROAMING AND CO-LOCATION**

13 March 2007

Introduction

1. We are happy to provide this comment on the Vodafone Draft Undertaking and Supporting Submission.¹ EWNZ has separately provided similar feedback to Vodafone.
2. It is difficult to determine whether the Draft Undertaking requires detailed comment, as the Draft Undertaking does not appear ripe for comment or for acceptance or approval by the Commission: it may be withdrawn at any time,² it does not include final pricing,³ and it is subject to the Commission's completion of its Schedule 3 Investigation.⁴ Therefore, we have limited ourselves only to a general overview of our concerns with specific terms of this Draft Undertaking pending release by Vodafone of a definitive undertaking.
3. In addition, while we recognize and support the Commission's interest in promoting industry-led solutions, we remain unconvinced that the new Undertaking process, on its own⁵, will help to promote competition or commercial resolution of access issues. The Undertaking process appears substantially similar to the process of actual regulation, and is subject to substantial delays during the public "negotiation" process of release and comment from the industry. The Undertaking process is therefore subject to gaming tactics and delays, which upset the Commission's efforts to create facilities-based competition.
4. Despite these misgivings, we are happy to participate in this process in order to further an equitable resolution of the key issues raised in the Commission's October Report.
5. EWNZ's view is governed by its desire to commence facilities-based competition. In order to do so, EWNZ believes that the undertaking must have the indicia of a competitive, commercially reasonable offer. Those indicia can be summarised by the following principles:
 - Cost-based pricing;
 - Promotion of economic efficiency for both the access seeker and the access provider;
 - Provision, with respect to roaming, of seamless hand-over, efficient routing, and access to 3G, data, and SMS services;
 - Furtherance of facilities-based entry in order to promote competition at both the wholesale and end-user levels.
6. For a more detailed overview of EWNZ's rationale, we refer the Commission to our Schedule 3 Submission.
7. As EWNZ expresses in its Schedule 3 Submission, filed contemporaneously with this comment, we do not feel that this Draft Undertaking is sufficient for EWNZ to commence facilities-based competition. EWNZ's main concerns with the Draft Undertaking can be summarised as follows:
 - (a) Price. The proposed level of pricing is well above cost and would seriously constrain EWNZ's ability to compete at a retail level.
 - (b) Non-price terms. There are a number of non-price terms which would seriously constrain any retail offering of EWNZs. Our concerns are set-out in detail below. The most important concern is Vodafone limiting EWNZ ability to resell the Vodafone

¹ Vodafone New Zealand Limited *Undertaking to the Commerce Commission under Schedule 3A in respect of national roaming co-location services*, 19 January 2007 ("Draft Undertaking"); Vodafone *Submission in support of an Application for Schedule 3A Undertaking in respect of National Roaming and Co-location*, 19 January 2007 (the "Supporting Submission").

² Draft Undertaking, para. 4.2.

³ See, e.g., Supporting Submission, para. 11.

⁴ See, e.g., Supporting Submission, para. 24.

⁵ That is, without continued pursuit of a regulatory solution.

roaming services to third parties. This effectively prevents EWNZ from being able to offer MVNO services and therefore severely limits potential retail level competition.

(c) Level of detail. Key technical and commercial detail is missing from the proposal.

8. While these terms are still short of a commercially reasonable offer, they are a marked improvement over historical offers. We therefore look forward to further consultation as this undertaking is developed in conjunction with the Commission's Schedule 3 investigation.

Roaming

9. Following is a summary of our primary concerns with the terms of the roaming service proposed in the Draft Undertaking:
10. Term (Para. 2.1). A five year term does not provide sufficient time for a new market entrant to complete a roll-out of a nationwide network. While we recognise that Vodafone may eventually wish to decommission its GSM network, such concerns can be best addressed by ensuring that 3G roaming is made available, and providing sufficient time for the access seeker to transition and prepare its services. We would think that an initial 5 year term with automatic annual renewal thereafter would be more appropriate.
11. Scope of the Roaming Service (Schedule 1, Para. 3.1). In general, we accept the principal that the roaming services include voice and data applications. Our technical team requires more detail, however, to have a clear understanding of what these “basics” are. As a general rule, we believe a policy of “equivalency of service” between Vodafone customers and EWNZ customers would be an essential component of describing the nature and scope of services to be provided under the roaming agreement. In this regard we would expect no differentiation in service for EWNZ’s customers, with the exception of Vodafone-exclusive content only.
12. There are a number of exclusions to the roaming service that would severely impact on EWNZs ability to provide retail-level competition. Such exclusions include:
 - Non-mobile applications
 - Synchronous services
 - Information services
 - Mobile commerce services
 - Location based services
 - Customer self-service applications
13. Pricing (Schedule 2). As a Mobile Network Operator intent on a combined national roll-out of GSM/3G infrastructure we would see national roaming as providing additional coverage for us, and incremental revenue for the roaming supplier. The roaming rate a new entrant pays directly affects the level of price-competition in the market for end-user services. Reasons for this include:
 - For marketing reasons, a new entrant will want to offer the same rate to customers regardless of whether they’re roaming on the access provider’s network. (This has been the experience of most new entrant’s in overseas markets.)
 - Especially during the early years of network deployment, a substantial proportion of the new entrant’s traffic will be roaming on the access provider’s network.
 - The new entrant faces substantial financial risk if it is forced to sell certain types of call below its out-of-pocket cost. (This was a contributing factor in the collapse of OneTel in Australia: OneTel was forced to offer roaming rates substantially below their out-of-pocket costs in order to compete on a pricing basis with the incumbents.)
14. The wholesale price at which the roaming service is made available should not impair our ability to compete at the retail level. We would therefore expect pricing to be more reflective of international benchmarks.
15. The proposed prices are far above reasonable commercial rates. We therefore do not think it would be helpful to counter-propose any alternate pricing at this time. We would note, however, that, compared with existing service plans, the mark-ups on these services are usurious: for example, SMS messaging is now widely available for 1,000 messages for \$10 (and even better plans are available), meaning that the retail price of SMS messaging is 1

- cent. Meanwhile, they propose wholesale roaming messaging of 9.5 cents per leg (or 19 cents on a roamer-to-roamer text). This is unrealistic, and doesn't even come close to representing a retail-minus approach,⁶ let alone a commercially competitive cost-based approach.
16. We would also suggest that price should be linked directly to network roll-out and the implementation of exclusion zones. Initial base rates can be agreed and we would suggest that these should be discounted from the implementation date based on roll-out forecasts. Further discounts should apply in accordance with an agreed schedule as roll-out is achieved and exclusion zones are implemented.
 17. With respect to Vodafone's proposal to consider geographic de-averaged pricing, our view is that wholesale revenue in rural areas is incremental to the provider (as the provider has sunk costs and spare capacity). As Vodafone notes, in rural areas it may be appropriate to avoid duplicating unnecessary infrastructure.⁷ We therefore interpret Vodafone's suggestion to be that it foresees offering additional discounts in rural and other low-capacity usage areas. We would agree with such a suggestion, and see this as evidence that Vodafone is willing to pursue and engage in substantive pricing negotiations. We look forward to seeing the scope of any discount Vodafone is likely to provide for rural coverage in its next update to the Draft Undertaking.
 18. We also welcome Vodafone's proposal that we consider facilities-sharing in places where it would not be efficient for either party to replicate full network infrastructure.⁸ (We would note, however, that this proposal seems inconsistent with Schedule 3, para. 5.5 of the Draft Undertaking, which allows Vodafone to terminate the service if there is a reduction in traffic volume. Such a reduction would be likely over the long term as the Access Seeker's network matures.)
 19. As a final note, we feel all pricing should be on a per-second basis rather than one minute and one second basis, as this is more consistent with international norms. We would also have a principal where the first 7 seconds of any call are not billed from call set up. We also believe that there is room and reason for improvement on the issue of leg-based billing.
 20. MVNO and Re-sale (Para. 1.1, 8, 10). We cannot accept the principle of restricting our business relationships, or discriminating against particular providers. As noted more fully in our Schedule 3 Submission, the ability to re-sale, MVNO, and otherwise compete on the wholesale level is a fundamental component of competition. Limitations on EWNZ's resale rights in the proposed Undertaking would need to be removed.
 21. Service Level Agreements (SLAs) (See Para. 3.2, 3.3, 3.8). We believe that detailed SLAs, and the objective of "equivalency of service" between Vodafone and EWNZ end-users, must be in place for this service. In addition, we would expect that planned outages and withdrawal of service would occur only in accordance with agreed procedures, especially as even a TSLRIC price would provide sufficient margins to ensure capacity is maintained. We would certainly require and would look at further definition of time frames on the decommissioning of cell sites and termination of services in relation to clause 3.3.
 22. Access Fees and Roaming Development Costs (Para. 4, 5). Vodafone derives a return for investment in the provision of wholesale services, and it is reasonable to assume that cost recovery will come from the provision of these services to a number of access seekers. Any set-up costs or implementation fees, where agreed, should be based on demonstrable cost

⁶ Vodafone tentatively supports a retail-minus approach. See the Supporting Submission, para. 39. While sub-optimal for promoting competitive new entry, as we more thoroughly address in our Schedule 3 submission, we would note that the Undertaking does not even appear to reflect a retail-minus approach; it's more of a retail-plus.

⁷ Supporting Submission, para. 35.

⁸ Id.

rather than reasonable cost and should be agreed and capped in advance. We do not believe a principal of minimum payment is appropriate.

23. Exclusion Zones (Para. 6). We are in broad agreement on the principal of Access Seeker-defined Exclusion Zones, and would want the assurance that there would be no roaming in areas where EWNZ has built coverage. We would need to review the Vodafone Location Areas and the process of changing these at any predetermined time through a formal implementation process, as there are integration, handover, and set-up issues that need to be considered with relation to the Exclusion Zones.
24. Marketing (Para. 7). We concur that the Vodafone brands is sacrosanct and we will ensure that this remains so. However, we do not believe that Vodafone should have any rights with respect to the EWNZ brand or the usage thereof. This bears particular importance with the importance of enabling MVNO and reselling arrangements (see paragraph 20, above).
25. Excluded Operations (Para. 8). We do not believe that Vodafone should have the right to offer roaming services to EWNZ on an exclusive basis. We must be free to look for services from other parties, or there may be a simply failure of competition through a contractual lock-in. We would especially wish to reserve the right to enter into agreements with other technology providers.
26. Efficient Routing (Para. 11). We think that, at a minimum, routing needs to occur through the most efficient means. A combination of interconnection agreements and hand-over points, using efficient routing, are critical components of a realistic roaming service. We do not see who benefits by the unnecessary hand-over of traffic, particularly on roaming-to-roaming calls or roaming-to-Access Provider end-user calls.
27. Miscellaneous. There are a number of other provisions which would likely require additional comment once more substantive terms have been proffered, including the scope of any security requirement (para. 13.1), the need to comply with any "reasonable instructions of Vodafone" (para. 3.7), the mechanism for re-defining exclusion zones and LAs (para. 6.2), and others. In particular, we are very concerned about the potential use and abuse of the forecast and marketing information we would be expected to provide. Whilst we recognize that Vodafone will need to manage traffic patterns, this is sensitive information, and we do not see any need for any sharing of marketing plans, promotions, or information beyond the provision of notice where a specific event may cause a short-term capacity surge. We reserve further comment pending receipt of Vodafone's updated Undertaking.

Co-location

28. Vodafone has stated that its co-location offer will be pursuant to the TCF code approved and adopted by the Commission. EWNZ has previously noted its concerns with the Master Co-location Agreement; in particular, we worry that certain rights reserved to the access provider under the Code will pose an undue risk, especially if the co-location price is kept high above the average rental rates paid by the access provider.⁹ However, we are willing to work within the confines of the Code provided equitable pricing can be established. Our primary concern with the Vodafone Draft Undertaking is therefore with the price at which co-location is made available.
29. As Vodafone has previously noted, where options other than co-location are available (and meet other technical site requirements, such as clear line-of-sight in the coverage area, the necessary antenna height, and to which RMA consent is not necessary are can be reasonably obtained) mobile operators can install their transmission facilities on a number of locations: they can install on a building rooftop or non-communications structure (such as a lamp post or utility tower), or they can construct their own antenna mast.¹⁰ EWNZ would therefore anticipate Vodafone competing with these other options in order to obtain the additional revenue and the benefit of reduced operating costs.
30. We can agree in principle to consider either of the two pricing options contained in the Draft Undertaking, though would need to see substantial reductions in pricing prior to accepting these terms and conditions. As a threshold matter, the proposed co-location prices must include a pro rata reduction based on the access seeker's use of the tower; for example, if the access seeker were to install three antennas on a mast supporting 9 access provider antennas, we would expect the price to be discounted to 25% of the overall price.

Conclusion

31. We look forward to continued consultation and discussion of the proposed undertaking as Vodafone further develops its pricing principles and terms. Based on Vodafone's Supporting Submission, we anticipate that the Undertaking will be based on reference to the Commission's Schedule 3 Investigation into the Roaming and Co-location Services. We would therefore suggest that the Commission could best achieve early conclusion of commercial agreements and development of this Undertaking through the expedited release of their draft proposal. In particular, we anticipate that the delayed submission schedule for Schedule 3 will not result in a further delay in the publishing of the Commission's draft report, previously projected as being released in May

⁹ For example, under the Master Co-location Agreement the access provider may remove or replace the access seeker's equipment where the access provider wishes to upgrade its equipment on the site. Under such a risk, it is unlikely an access seeker would be willing to invest in the installation and upgrade, particularly where they might be required to construct additional improvements that would then become the property of, and usable by, the access provider to the detriment of the access seeker.

¹⁰ In most co-location situations, of course, there are no other appropriate sites available, any optimal sites having been already taken by the Access Provider. However, even where alternate locations may be available, such as in some rural areas, we would anticipate the Access Provider providing access on a non-discriminatory, competitive wholesale basis in order to facilitate their own network efficiency. We think it counterproductive if their prices would instead merely encourage an Access Seeker in such a situation to construct its own infrastructure in order to save costs.